Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1417

Carl D. Bartholomew, D.C., et al.,

Petitioners

versus

Virginia Chiropractors Association, et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

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OCTOBER TERM, 1979

No.

Carl D. Bartholomew, D.C., et al.,
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versus

Virginia Chiropractors Association, et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The petitioners, Carl D. Bartholomew, D.C., et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in the above entitled cases, Fourth Circuit Nos. 78-1735 and 78-1736.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on November 20, 1979, and has not been reported. It is set forth in Appendix A. The opinion and order of the United States District Court for the Western District of Virginia, rendered May 19, 1978, is reported at 451 F. Supp. 624, and set forth in Appendix B.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit were entered on November 20, 1979. Petitioners filed a timely Petition for Rehearing and Suggestion For Rehearing in Banc. The order of the United States Court of Appeals for the Fourth Circuit denying Petitioners' Petition for Rehearing and Suggestion For Rehearing in Banc was entered on January 9, 1980. This Petition

is filed within ninety (90) days of that date.

The jurisdiction of the Supreme Court of The United States is invoked pursuant to the provisions of Title 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether non-insurer defendants can conspire to monopolize the practice of chiropractic, but immunize themselves from the anti-trust laws by combining with insurance companies to effect their monopoly.

2. Whether the defendants refusal to deal as to certain chiropractic services and their enforcement activities constitute boycott coercion and intimidation so as to forfeit McCarran Act Immunity.

3. Whether District Judge Warriner sitting by designation on the Fourth Circuit panel was sitting improperly under 28 U.S.C., §47 since

he had already decided issues in these cases in his District Court.

4. Whether an appeal may be decided by a panel which does not have a quorum of judges who constitute the Court of Appeals.

STATUTORY PROVISIONS INVOLVED

A. McCarran Ferguson Act, 15 U.S.C., §1011-1014. Reproduced in Appendix C.

B. 28 U.S.C., §47 provides:

> "No judge shall hear or determine an appeal from the decision of a case or issue tried by him."

C. 28 U.S.C., §1291 provides in pertinent part:

> "The courts of appeals shall have jurisdiction of appeals from all decisions of the district courts of the United States . . . ."

D. 28 U.S.C., §1294 provides in pertinent part:

> "Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district;"

E. 28 U.S.C., §43(b) provides in pertinent part:

"Each court of appeals shall consist of the circuit judges of the circuit in regular active service. The circuit justice and justices or judges designated or assigned shall also be competent to sit as judges of the court."

STATEMENT OF THE CASE

This private anti-trust action for treble damages, injunctive relief and pendent state claims was brought on behalf of five chiropractors engaged in their profession in the states of Virginia and West Virginia, alleging numerous anti-competitive acts in violation of the Sherman Act 15 U.S.C., §1 and 2. The insurance company defendants and the Virginia Chiropractors Association Peer Review Committee and President, (hereinafter VCA defendants), have devel-

oped and utilized a procedure by which the health insurance carriers submit their insured's bills for chiropractic services to the VCA Peer Review Committee for a determination of whether or not the fee is "usual and customary". The VCA defendants have apparently established as reasonable and customary a fee of $14-16 per office visit without regard to what services are provided. Defendant insurance companies routinely submit claims filed by plaintiffs' patients and the VCA defendants just as routinely advise the carriers and patients that the carrier's liabilities under the contract is substantially less than the amount billed. The carriers pay exactly what the VCA sets as a reasonable fee.

Plaintiffs maintain that the entire procedure is an attempt to monopolize the practice of chiropractic and health care in general and to dictate what methodologies will be utilized.

Plaintiffs ideologically differ from the VCA defendants as to proper chiropractic care and provide different and more numerous services per office visit than do VCA defendants and maintain that defendants have conspired to boycott certain services of plaintiff, chiropractors and encouraged and coerced their patient/insureds to likewise boycott plaintiff chiropractors.

In the trial court, defendants moved for summary judgment alleging that they were entitled to Antitrust Immunity under the McCarran Ferguson Act. The trial court denied all defense motions finding that boycott coercion and intimidation had been sufficiently alleged to render McCarran inapplicable. Interlocutory appeals were taken to the Court of Appeals for the Fourth Circuit. The Fourth Circuit panel, including a Senior Judge and a District Court Judge sitting by designation reversed in a two to one opinion

holding that the alleged activities constituted the business of insurance and that no boycott had been adequately alleged, so that McCarran Immunity was appropriate. Plaintiffs' Petition and Suggestion For Rehearing In Banc was denied.

REASONS FOR GRANTING THE WRIT

I.

The Fourth Circuit decision is contrary to the decision of this Court in Group Life and Health Insurance Co. v. Royal Drug Co.; 440 U.S. 205 (1978).

This Court's decision in Group Life and Health Insurance Co. . Royal Drug Co., 440 U.S. 205 (1979), (hereinafter Royal Drug) provided a framework for determining whether alleged activities constitute the "business of insurance" within the meaning of the McCarran Ferguson Act. This Court's Royal Drug analysis makes clear that the spreading and underwriting of risk are the primary elements of the business

of insurance and mere cost savings arrangements are not the business of insurance.

In finding the activities alleged in the instant case to be the business of insurance, the Fourth Circuit focused on "the relationship between the insurance company and the policyholder", but totally ignored the absence of risk spreading.

The utilization of the peer review apparatus complained of in the instant case does not spread risk; in Royal Drug terms, all peer review does is "minimize costs and maximize profits" which however desireable from a business standpoint, is not the business of insurance.

There is no difference between the participating contracts in Royal Drug and the utilization of a Peer Review System in which all parties know that the results will be a "recommendation" that anything in excess of $14-16 per office visit

is not usual and customary. Both procedures are aimed at reducing the amount to be paid by the carrier. As this Court has concluded:

> "If terms such as 'reliability' and status as a reliable insurer were to be interpreted in the broad sense urged by the petitioners, almost every business decision of an insurance company could be included in the 'business of insurance'. Such a result would be plainly contrary to the statutory language, which exempts the 'business of insurance' and not the 'business of insurance companies'."
>
> Royal Drug at 217.

Moreover, defendant insurers' activities go beyond merely reducing what they will pay under their contracts; defendant carriers have advised their insureds that petitioners fees are unreasonable, have encouraged their insureds to refuse to pay any amounts above their determination of what is usual and customary, and have even gone so far as to retain counsel to defend policyholders in suits brought by peti-

tioners to recover the difference between the actual charge for services and the amount paid by the carrier under the peer review schedule. These activities certainly bear no relation to the underwriting or spreading of risk nor to the relationship between insurer and insured. Neither are they related to insurance "adjusting" or the business of insurance.

The Court of Appeals made a one paragraph attempt to distinguish Royal Drug which ignored even the rationale of the dissenting Justices (who would have granted McCarran Immunity in Royal Drug):

> ". . . this is not a case where the petitioner pharmacies themselves conspired to exclude others from the market, and either pressured Blue Shield to go along, or were voluntarily joined by the insurer. . . . Such an agreement among pharmacies, itself neither necessary nor related to the insurer's effort to satisfy it's obligations to its policyholders, would be outside the 'business of insurance'. An

> insurance company cannot immunize an illegal conspiracy by joining it."
>
> Royal Drug at 253. Brennan J., dissenting.

Petitioners in the instant case have alleged that defendants have established and utilized the peer review mechanism for the express purpose of fixing prices, monopolizing the profession and boycotting plaintiff chiropractors.

The opinion of the Fourth Circuit grants any potential antitrust defendant the power to immunize his activities from Sherman Act attack by inducing an insurance company to join in his activities.

II.

This Court should grant writs to resolve the many conflicting decisions in the trial and appellate courts throughout the country and provide a definitive decision in this area.

The proliferation of litigation concerning the scope of the "business of insurance" element of the McCarran Immunity test has not been resolved by Royal Drug. At present the Fourth and Fifth Circuits have issued conflicting opinions; appeals are pending in the Second, Fourth and Eighth Circuits; the D.C. Circuit has remanded a case to the District Court for reconsideration in view of Royal Drug; and at least two District Courts have made findings, (that the exemption does not apply) since the opinion of this Court in Royal Drug.

The present status of these cases is:

I. Finding Activities Without the Business of Insurance:

A. Liberty Glass Co. v. Allstate Insurance Co., 1980-1 Trade Cases (5th Cir., Nov., 21, 1979) Rev'g _____ F. Supp. _____.

B. Arizona v. Marcicopa County Medical Society, et al., 1979-1 Trade Cases, ¶62,694 (District of Arizona, June 5,

1979). (Apparently no interlocutory appeal has been sought on this issue)

C. National Gerimedical Hospital and Gerontology Center v. Blue Cross, 479 F. Supp. 1012, (W.D. MO 1979) (Presently on appeal to the Eighth Circuit)

D. United States v. American Society of Anesthesiologists, 1979-2 Trade Cases ¶62,739, (S.D., NY, June 22, 1979) (While the court dismissed on other grounds it suggested it "unlikely" that the McCarran defense raised would apply)

II. Finding Activities Within The Business of Insurance:

A. The instant case.

B. Proctor v. State Farm Mut. Auto. Ins. Co., 561 F. 2d, 262 (D.C. Cir. 1977), vacated (47 U.S.L.W. 3586) to D.C. Cir; remanded to U.S. District, D.C. Nov. 9, 1979.

C. Pireno v. New York Chiropractic Assn, No. 76-4309 (S.D., NY, March 15, 1979) (Presently on appeal to the 2nd Circuit)

D. Virginia Academy of Clinical Psychologists, et al., v. Blue Shield of Virginia, et al., 1979-1 Trade Cases, ¶62,635, 469 F. Supp. 552 (E.D., Va. April 9, 1979) (Presently on appeal to the 4th Circuit)

E. General Glass Co., et al., v. Globe Glass & Trim Co., 1978-2 Trade Cases, ¶62,231, (N.D., ILL, 1978)

Thus there is a conflict between the Fifth and Fourth Circuits, with the only other Circuit which has ruled on the matter, (D.C. Circuit in Proctor) recently remanding for reconsideration after Royal Drug. Appeals are pending in three Courts of Appeals and there are conflicts within presently unappealed District Courts as well. It is apparent that this issue is being widely contested with unpredictable and varying results and that it requires the clarification that only this Court can provide.

III.

The Fourth Circuit decision is contrary to the decision of this Court in St. Paul Fire & Marine Ins. Co. v. Barry, 98 S. Ct. 2923 (1978), and to traditional boycott analyses.

The decision of the Court of Appeals for the Fourth Circuit gave cursory acknowledgment to this Court's opinion in St. Paul Fire & Marine Ins. Co., v. Barry, 98 S. Ct. 2923 (1978) hereafter Barry, by describing a boycott as a "concerted refusal to deal " citing Barry. The Court then held that no concerted refusal to deal was involved in the instant case saying: (1) patients may still freely choose their doctor; (2) the chiropractor can seek collection from his patient for anything not paid by the carrier; (3) there is no duress from defendants to induce a patient to employ a chiropractor who charges according to the committee's allowances; (4) the insurance companies do not refuse to do business with plaintiff chiropractors and (5) no compulsion requires unwilling chiropractors to surrender to the peer review process.

These conclusions, while not in themselves sufficient to warrant a finding of no boycott, are moreover simply in error. (1) Patients may freely choose their doctor but only one who accepts or capitulates to the practice methodologies of the VCA; otherwise, patients must absorb the financial risk which they sought to underwrite with insurance. (2) The chiropractor is not totally free to seek collection from his insured patient for the amount unpaid by the insurer, if that insurer hires counsel to defend the insured on the basis of the peer review committee "recommendation". (3) The patient is induced, encouraged, coerced and intimidated by the threat of non-payment to employ a chiropractor who practices in the manner the VCA wants everyone to practice. (4) The insurance companies jointly refuse to do business with plaintiff chiropractors for services the VCA

members would not or could not have rendered. A vivid example of defendants refusal to deal concerns Chiropractic Intensive Day Care which includes multiple adjustments and therapeutic modalities administered during each extended office visit. Payments of $14-16 for a half day of treatment which defendants do not endorse as a practice of methodology illustrates the basis for the allegations that the defendants have engaged in an unlawful combination and conspiracy to boycott, intimidate and coerce the plaintiffs in a concerted effort to monopolize the practice of chiropractic. Finally, unwilling chiropractors are compelled and intimidated to surrender to the peer review process by the VCA committee sending out letters to plaintiffs' patients that the bill they received was three or four times what is usual and customary, without any explanation that what the committee views as usual and

customary entails only one-third or one-fourth as much service. The compulsion is the publication by a seemingly, (to the public), authoritative body that plaintiffs are overcharging. This compulsion is compounded by the carrier's apparently advising their insured's to not pay any amount above the peer review "recommendation" and volunteering to retain counsel if the treating chiropractor is so bold as to bring suit for collection.

In addition to simply being wrong in it's conclusions, the 4th Circuit completely ignored the analysis of this Court that:

> "The generic concept of boycott refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target."
>
> Barry at 2930.

In the instant case the VCA defendants had a dispute with plaintiff chiropractors as to the

proper methodology for case management, multiple-utilization of therapy, and "intensive day care". By enlisting the help of insurance companies, VCA defendants pressured plaintiff to discontinue use of the disputed methods by enlisting the insurance companies to refuse to pay for such sophisticated treatment. Concomitantly the insurers encouraged, and in fact, coerced and intimidated their insureds to withhold patronage from the target plaintiff chiropractors by threat of non-payment. As this Court pointed out in Barry:

> "The pact served as a tactical weapon invoked by St. Paul in support of a dispute with its policyholders. The enlistment of third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group, long has been viewed as conduct supporting a finding of unlawful boycott."
>
> Barry at 2931.

Petitioners thus maintain that the 4th Circuit opinion conflicts with this Court's Royal Drug decision. In addition, defendants activities constitute a traditional boycott under pre-Barry standards.

In Klor's v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959), (hereinafter Klor's), boycott was found when the plaintiff, Klor's, a retail store which competed with Broadway-Hale, charged that Broadway-Hale conspired with several appliance manufacturers and distributors "either not to sell to Klor's or to sell to it only at discriminatory prices and highly unfavorable terms". (id. 209) The activity in Klor's has a counterpart in the instant case. It is alleged here that insurance companies have conspired with the VCA defendants and the American Chiropractic Association to refuse to deal with the plaintiffs except on certain terms and for certain services.

In Ballard v. Blue Shield of Southern West Virginia, 543 F. 2d. 1975, (4th Cir. 1976), the Court reversed the dismissal of a suit brought by a group of chiropractors against Blue Shield for failing to pay for chiropractic services. Similar elements are found here. If plaintiff charges $10 for ultrasound, $10 for intersegmental traction and $10 for diathermy, all in the same office visit, and he is paid $14-16, then he is unpaid for at least one of those services. It is also to be noted that here, as in Ballard, similar services rendered by medical doctors and hospitals are routinely paid. A patient can go to an orthopedist and receive physical therapy and be paid, but the same services provided by a chiropractor are not paid.

The recent Proctor decision by the D.C. Circuit reaffirms the viability of this "partial boycott" analysis.

> "We cannot agree with the District Court's opinion to the extent that it is premised on the belief that a total refusal to deal is necessary to prove a group boycott in violation of the Sherman Act."

Proctor, supra, at 71, 871.

That some dealing could continue under a boycott situation is quite possible since the boycott simply may not have been totally successful or alternatively that the conspiracy could have been intended to simply reduce, not eliminate plaintiff's competition. In California League of Independent Insurance Producers v. Aetna Casualty & Surety Co., 179 F. Supp. 65 (N.D. Cal. 1954). There the Court stated that:

> "(I)n addition, the defendants contend that the terms of §3(b) U.S.C., §1013(b) are directed to a concerted absolute refusal or the inducement of others to refuse absolutely to deal. Thus, the defendants distinguish between an absolute refusal and a refusal except at a fixed price. The distinction is without substance."

id. at 66.

These cases reveal that a partial boycott is sufficient to remove McCarran Immunity from the instant case. Even though the insurers and Peer Review Committee authorize payments for some services by plaintiff chiropractors, their refusal to deal as to other services rendered on the same office visit brings their conduct within the boycott exception.

IV.

The District Judge sitting by designation on the Fourth Circuit panel had previously tried issues in his District Court which prohibited him from hearing this case on appeal.

Under 28 U.S.C. §47, "No judge shall hear or determine an appeal from the decision of a case or issue tried by him." Plaintiffs maintain that Judge Warriner decided issues found in these appeals in the case of Virginia

Academy of Clinical Psychologists, et al., v. Blue Shield of Virginia, et al., (1979-1 Trade Cases, ¶62,635), 469 F. Supp. 562, (E.D. Va., 1979), (hereafter, Virginia Academy), and was consequently disqualified under the statute from determining these appeals.

Judge Warriner in Virginia Academy applied his interpretation of Group Life and Health Insurance Co. v. Royal Drug Co., Inc. (1979-1 Trade Cases, ¶62,479, 47 U.S.L.W. 4203 (U.S. Feb. 27, 1979) to the 'business of insurance' issue in Virginia Academy.

Also at issue in these appeals is whether a partial refusal to deal constitutes a boycott within McCarran. Judge Warriner ruled in Virginia Academy: "There cannot be a refusal to deal when plaintiffs complaint is that the terms on which they are dealt with are disadvantageous." Virginia Academy at p. 77, 611.

Whether disadvantageous dealing constitutes a partial boycott is precisely one of the issues in these appeals.

Any doubt as to the identity of issues between the two cases is resolved by the fact that the Fourth Circuit cited Virginia Academy as authority for it's definition and analysis of a boycott.

Judge Warriner's participation in these appeals violated the statute in both its letter and its spirit to ensure that the Appeals Court be constituted of judges "uncommitted and uninfluenced by having expressed or formed opinion" in the District Court. Moran v. Dillingham, 174 U.S. 153, (1899); Rexford v. Brunswick-Balke-Collender Co., 228 U.S. 339, (1913).

While the majority of cases dealing with the statute involved issues arising from the same case or between the same parties in the District Court and Court of Appeals, the statu-

tory language does not require that the issue involve the same case. Moreover, in Chance v. United States, 331, F. 2d 473, (CA 5 FLA, 1964), holding that a Judge was not disqualified, the Court pointed out that the Judge made no prior ruling on the question raised on appeal, either in its present case or in any other case. Thus plaintiffs maintain that the statute is applicable to the situation here and that the opinion should be vacated and these appeals reheard, since the removal of Judge Warriner would leave the remaining panel members divided.

V.

The panel which decided this case was improperly constituted.

The practice of permitting an appeal to be decided by a panel consisting of less than a quorum of judges who constitute the Court of Appeals raises serious questions of judicial administration

and statutory construction. These questions have not been, but should be, addressed and resolved by this Court.

An appellant has a right to appeal the judgment of a District Court to the Court of Appeals for that Circuit. 28 U.S.C. §§1291, 1294. The Court of Appeals "consist[s] of the circuit judges of the circuit in regular active service." 28 U.S.C. §43(b). It is not disputed that a District Court Judge or a Senior Judge is "also competent to sit" when properly designated or assigned, 28 U.S.C. §43(b). The question presented arises only when, as in this case, more than one Judge of a three-judge panel is so designated or assigned. The instant case clearly demonstrates the lack of judicial economy and the uncertainty of future determinations when the panel is so constituted; for in this case Senior Judge Bryan, Judge Hall and District Judge Warriner constituted the panel.

If an appeal such as Virginia Academy of Clinical Psychologists, et al., v. Blue Shield, 1979-1 Trade Cases (E.D. Va., April 9, 1979) should be heard in banc, neither of the Judges constituting the majority in the instant case would consider the appeal.

If circuit judges in regular active service are available, could a Court of Appeals order that an appeal be heard by three district judges sitting by designation? It is doubtful. Where then, must the line be drawn? Petitioners submit that it is both rational and reasonable to require that no panel of a Court of Appeals may have more than one judge who is not in regular active service.

For these reasons petitioners maintain the judgment below was rendered by a panel improperly constituted and this case must be remanded to the Court of Appeals.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Petition for Writ of Certiorari has been furnished to the following:

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1734

Carl D. Bartholomew, D.C., et al,
Appellees,

v.

Virginia Chiropractors Association, Inc., et al,
Defendants
and
American Chiropractors Association
Appellant.

No. 78-1735

Carl D. Bartholomew, D.C., et al,
Appellees,

v.

Virginia Chiropractors Association, etc., et al,
Appellants.

v.

American Chiropractic Association, et al,
Defendants.

No. 78-1736

Carl D. Bartholomew, D.C., etc., et al,
Appellees,

v.

Virginia Chiropractors Association, Inc., etc., et al,
Defendants,
and
The Metropolitan Life Insurance Company, et al,
Appellants.

(STATUS CHANGE: UNPUBLISHED to PUBLISHED)

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, District Judge.

(Argued April 5, 1979 Decided November 20, 1979)

Before BRYAN, Senior Circuit Judge, HALL, Circuit Judge, and WARRINER, District Judge, sitting by designation.

Sidney S. Rosdeitcher (Howard S. Veisz, Paul, Weiss, Rifkind, Wharton & Garrison; John L. Walker, Jr., Woods, Rogers, Muse, Walker & Thornton on brief) for Appellants The Aetna Casualty and Surety Company, Metropolitan Life Insurance Company, and The Travelers Insurance Company; Stephen Northup (James C. Roberts, Anthony F. Troy, Mays, Valentine, Davenport & Moore on brief) for Appellant Virginia Chiropractors Association, Inc., William L. Vohringer, D.C., Clarence Wright, D.C., Henry L. Dodge, D.C., Peter Goodfield, D.C., James S. Henderson, D.C., and George McClelland, Jr., D.C.; Sigmund Timberg (Hart & Hart, Attorneys, Ltd. on brief) for Appellant American Chiropractic Association, Inc.; C. Jacob Ladenheim (Ralph C. Wiegandt, Minter, Wiegandt & Ladenheim on brief) for Appellees Carl D. Bartholomew, D.C., et al.

Albert V. Bryan, Senior Circuit Judge:

Plaintiffs, five chiropractors engaged in private practice in Virginia and West Virginia, brought this action under the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2,[1] for damages and injunctive relief. Named as defendants were the Virginia Chiropractors Association (VCA), its president, the American Chiropractic Association (ACA), three health insurance companies and five individual chiropractors, formerly serving on the Peer Review Committee of VCA. The accusations arose out of the structure of the peer review system. Defendants' motions to dismiss were rejected;[2] they appeal; we reverse.

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1. 15 U.S.C. § 1 (1975) reads in pertinent part:
"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

15 U.S.C. § 2 (1974) is as follows:
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

2. Bartholomew v. Virginia Chiropractors Ass'n, No. 77-0062-R (W.D. Va. May 18, 1978).

Peer Review's duties include pursuing inquiries from insurance companies. Upon receiving a bill for chiropractic services from an insured patient, an insurance company may submit the statement to the Committee. The latter then ascertains for the insurers the usual and customary charges for such attention, referring therefor to a schedule of rates considered fair and reasonable by the ACA and the VCA;[3] the amount so ascertained is then remitted to the insured by the insurer. Mechanisms for reviewing decisions of each State Peer Review Committee throughout the country are furnished by the ACA.

Plaintiffs, non-members of VCA, complained that the Peer Review process constituted a conspiracy between the chiropractic associations and the insurance companies to fix prices, thereby monopolizing the practice of chiropractic. The alleged price fixing stems from the ceiling imposed by the Committee on the usual and customary charge for an office visit. This ceiling is the maximum amount compensable by insurance but is apparently not adequate to compensate plaintiffs for various additional or intensive treatments they may perform during the course of an office visit. The effect, plaintiffs argue, is a boycott. Defendants have, it is asserted, refused to deal with them regarding services provided and billed in excess of the maximum for a single

3. "The insurance contracts limit reimbursement to usual and customary charges for necessary health care services rendered." Id.

visit. Plaintiffs' claim is that the conspiracy also extends to coercing their patients into seeking treatment elsewhere. In order to increase the percentage of their bills reimbursable by insurance, patients will seek the services of chiropractors who have adapted their charges to the ACA and VCA fee schedule. Thus, plaintiffs assert that they are coerced and intimidated into accepting VCA's pricing rituals.

Ancillary State claims have, at the same time, been asserted against the defendants for interference with plaintiffs' contractual relations with their prospective patients, as well as for libel and slander of plaintiffs' professional practice.

In response, the ACA initially moved to dismiss the suit for lack of venue, pleading Des Moines, Iowa as its domicile, and asserting that it was not present or transacting business in Virginia.[4] All defendants have moved for dismissal under Fed. R. Civ. P. 12(b)(6) or for summary judgment under Fed. R. Civ. P. 56, on the ground that the McCarran-Ferguson Act[5] exempted them from the antitrust laws, because they were in "the business of insurance"[6] with no conduct amounting to "boycott, coercion, or intimidation."[7] They further moved to dismiss the ancillary State claims for lack of jurisdiction in the event that the Federal antitrust claim was dismissed.

4. 15 U.S.C. § 22 (1914). Quoted at page 5 supra.
5. 15 U.S.C. §§ 1011-1115 (1947).
6. Id. § 1012(b).
7. Id. § 1013(b).

The District Court denied all the motions. Upon defendants' interlocutory appeal[8] (perfected only as to the antitrust claims), we reverse.

I. ACA: IMPROPER VENUE

Venue for this action is delineated in Section 12 of the Clayton Act in these terms:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C. § 22.

Admittedly, ACA was neither an "inhabitant" of Virginia, nor could it be "found" there. Yet, contrary to appellants' insistence, the District Court concluded that venue was proper in the Western District of Virginia as ACA "transacts business" in the State. Employing the familiar touchstone, the trial court examined whether ACA engaged in "[t]he practical, everyday business or commercial concept of doing or carrying on business 'of any substantial character.'" United States v. Scaphony, 333 U.S. 795, 807 (1948). See Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 373 (1927). It framed the character of the national association's operations as follows:

> The ACA . . . is not a commercial, profit-making organization whose business can be described by sales and purchases, but is a non-profit organization whose activities are described as educational and informative in nature directed toward advancement of the chiropractic profession, the improvement of chiropractic performance and toward better understanding of the profession by the public, insurers, and government. Public relations and professional advancement are its "business." (Footnote omitted)

Erroneously, however, in finding jurisdiction, the District Court accepted as decisive the following activity imputed to ACA by plaintiffs as disclosing its "transact[ion of] business" in Virginia:

> The plaintiffs have alleged that in furtherance of this "business" the ACA has solicited every commercial and educational radio and television station in Virginia for air time, and received air time, billboard space and newspaper space valued at more than $250,000 for the years 1974-1976. The ACA provided the radio and television recordings and films, which in 1976 cost $180,000 to prepare. These amounts are substantial and show a continuous solicitation of advertising time in this district in furtherance of defendant's essential purpose, to supply information about the chiropractic profession. (Citations omitted.)

This recital must be tempered by the defendants' answer to plaintiffs' response to interrogatory No. 3:

> (a) No cost has been incurred by ACA for the use of television, radio and newspapers in Virginia. However, the materials used by the mass media are prepared by ACA at its own cost, which, for the fiscal year April 1, 1976 to March 31, 1977, amounted to $180,000 nationally.
>
> (b) The public service free time that ACA has succeeded in obtaining from the TV and radio media, and the

8. 28 U.S.C. § 1292(b) (1958).

> free billboard and newspaper space that it has succeeded in obtaining from those media, has no market or commercial value for ACA. These public service educational programs prepared by ACA are devoted exclusively to educating the public as to the nature and problems of chiropractic treatment and the role of the chiropractic profession; as pointed out in 3(a), above, they operate at a loss to ACA." (Accent added.)

Notwithstanding that the burden is upon plaintiff to establish venue and jurisdiction, Call Carl, Inc. v. B P Oil Corp., 391 F. Supp. 367, 370 (D. Md. 1975), the quoted response was not traversed nor even attempted.

Enumeration of the points of contact ACA has with Virginia, even without limiting the discussion to the Western District, will entirely raze all imprint of its venue-presence. Virginia accounted for only 53 of the 8875 national members, .06 percent of its membership. ACA never qualified to do business in Virginia (only in Delaware) and its sole office was in Iowa. In Virginia, there were no offices, no officers, no agents, no property, no purchases, no seminars or workshops, and no sales save of pamphlets, journals, and other educational and public relations materials generating very little revenue. All transactions were by mail. No membership meetings were convened in Virginia; no directors or employees resided there.

ACA trained in Iowa the six chiropractors comprising peer review personnel for Virginia. Akin to its practice with all other State associations, ACA corresponded

with VCA. It had not crossed into Virginia in perfecting its purposes or, as the District Judge observed, "to participate with the VCA peer review program."

ACA's solicitation of advertising time and its dissemination across Virginia boundaries of correspondence, informational materials, public service educational programs by mail, radio, television and newspaper (free of cost to ACA) was not transacting business in the State within the meaning of Section 12 of the Clayton Act, 15 U.S.C. § 22. Likewise the transmittal of such items into Virginia by mass media for subsequent telecasting, broadcasting or publishing was not within the Act's domain. People's Tobacco Co. v. American Tobacco Co., Ltd., 246 U.S. 79, 87 (1918); Golf City, Inc. v. Wilson Sporting Goods Co., Inc., 555 F.2d 426, 437-38 (5th Cir. 1977); Friends of Animals, Inc. v. American Veterinary Medical Ass'n, 310 F. Supp. 620, 624 (S.D. N.Y. 1970); Wentling v. Popular Science Publishing Co. Inc., 176 F. Supp. 652, 656-57 (M.D. Pa. 1959); Elizabeth Hospital, Inc. v. Richardson, 167 F. Supp. 155, 158-59 (W.D. Ark. 1958). Otherwise, every State in the Union into which such programs were aimed or thrust by media or mail would provide an acceptable forum for suit based on "transact[ing] business" therein.

II. DEFENDANTS' EXEMPTION FROM ANTITRUST LAWS

All of the defendants, even ACA, if it had been within the jurisdiction of the Court, were immunized from

responsibility under the Sherman Act by the McCarran-Ferguson Act because they were engaged in the "business of insurance."[9] Lach of them played a part in the peer review system and, thus, was in the business of insurance. Initially, before the trial court, plaintiffs conceded that the insurers — Metropolitan Life Insurance Company, The Atena Casualty and Surety Company and The Travellers Insurance Company — were in the business of insurance when participating in the peer process. This concession has been withdrawn, but, nevertheless, in fact and in law, these companies were operating in that character.

The essence of the business of insurance is "the relationship between the insurance company and the policyholder." SEC v. National Securities, Inc., 393 U.S. 453, 460 (1969). Mindful of this precept, the analysis now following of the parts the defendants indisputably played demonstrates beyond question their engagement in the business of insurance:

1. To begin with, the companies issued policies

9. 15 U.S.C. § 1012(b). As here applicable, it reads:

> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

of health insurance.

2. As aforesaid, the pattern was for the chiropractor to send his bill to the patient and he, in turn, passed it on to his own insurance carrier for indemnification or reimbursement by virtue of the patient's insurance policy.

3. The insurance carrier thereupon submitted the bill to VCA for examination by the Peer Review Committee.

4. Payment was then made by the insurer to the patient-policyholder and not to the chiropractor, unless directed by the policyholder so to do. The patient received the amount approved by the Peer Review Committee according to the VCA fee schedule.

5. ACA's participation was to adjust, if feasible, any monetary differences between the insurer and patient in an appeal process.

6. The ACA had from the beginning contributed its share in the business of insurance by consulting with the insurers to establish the schedule of allowable fees.

7. The sole parties to the system were the insured and the insurer. Cf. id.

Exuding throughout is evidence of a unitary thesis: each defendant's activities touched upon "the business of insurance." Incidentally, plaintiffs conceded that the insurer-defendants are regulated by the State, as contemplated in the McCarran Act's grant of antitrust immunity to insurance

companies.[10] Bartholomew v. Virginia Chiropractors Ass'n, No. 77-0062-R (W.D. Va. May 18, 1978). Hence, the plan was well within even the straits of the Act.

This conclusion does not trespass upon the teachings of Group Life & Health Ins. Co. v. Royal Drug Co., 47 U.S. L.W. 4203 (Feb. 27, 1979). In that case there were two segregated and disparate operations: one, the offering of insurance, and the other, the procurement of drugs, admittedly an act only thinly tangential to insurance. Obtaining drugs under the Pharmacy Agreement was a business of the insurance companies, not the business of insurance. Royal Drug at 4207, n. 18. In the present instance, there is an integration of component acts resulting in a single, composite business—insurance. For an especially clarifying discourse of this and the related issues see generally Pireno v. New York Chiropractic Ass'n, No. 76-4309 (S.D.N.Y. March 15, 1979).

III. NO BOYCOTT

"Boycott" under the Sherman Act is a "concerted refusal to deal," St. Paul Fire & Marine Insurance Co. v. Barry, 438 U.S. 531, 536 (1978), quoting Barry v. St. Paul Fire & Marine Insurance Co., 555 F.2d 3, 8 (1st Cir. 1977); see Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia, 469 F. Supp. 552, 563 (E.D. Va. 1979). Hence, we employ that standard to gauge whether peer review constitutes

10. Neither party raised the question of State regulations with respect to the non-insurer defendants, however.

an agreement to boycott, coerce, or intimidate," which could remove it from the shield of the McCarran-Ferguson Act.[11]

It is difficult to perceive any "concerted refusal to deal" in the mechanisms of the ACA or VCA. Patients may still freely choose their doctor. Furthermore, the peer review system does not limit the fees of a chiropractor. Indeed, if the Committee finds a charge to be beyond the patient's insurance, the insurer pays the patient the sum recommended by VCA; the chiropractor may then seek collection from his insured patient for the amount in excess of the policyholder's coverage.

If this arrangement induces a patient to employ a chiropractor who charges according to the Committee's allowances, this is a legitimate option of the patient; it evidences no duress by the member insurers and chiropractic associations. Likewise, the insurance companies do not jointly refuse to do business with chiropractors not belonging to the association. Similarly, no compulsion of any kind requires unwilling chiropractors to surrender to the peer review process.

The judgment denying the defendants' motions cannot stand. We remand to the District Court with instruction to grant defendants' motions to dismiss.

Reversed and
Remanded with Directions.

11. Id. at § 1013(b). "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

HALL, Circuit Judge, concurring in part and dissenting in part:

I concur, somewhat timorously, in the majority's holding that the American Chiropractic Association is not transacting business in the state of Virginia. But I strongly dissent from Part II of the majority opinion, which allows providers of services to restrain trade in their markets, free from antitrust liability, if they enlist an insurer's aid in enforcing their scheme. By ignoring the language of the McCarran Act, its history, and the Supreme Court's insistence that the statute be strictly construed, the majority transforms a narrow area of deference to state regulation into a broad grant of antitrust immunity to insurance companies and their cohorts outside the industry.

I.

The majority attempts to distinguish this case from Group Life and Health Insurance Co. v. Royal Drug Co., 99 S.Ct. 1067 (1979), in which the Supreme Court held that an insurer's arrangements with pharmacies, setting a maximum price for drugs furnished to its policyholders, is not within the scope of the McCarran Act's antitrust exemption for the "business of insurance."[1/]

[1/] In district court, the insurance company defendants insisted that "disposition of this case is simplified because the McCarran Act questions it raises have been disposed of in at least five recent cases. . .with facts not materially distinguishable from those involved here." "Insurance Company Defendants' Memorandum of Points and Authorities in Support of Their Motion to Dismiss" at 7. One of these cases was Royal Drug (defendants relied on the district court's holding in that case that the pharmacy agreements were the business of insurance. 415 F.Supp. 343 (W.D. Tex. 1976). Of the four other cases the defendants here found indistinguishable, two were singled out by the Supreme Court in Royal Drug as being "in conflict" with the Court's own interpretation of the phrase "business of insurance": Anderson v. Medical Service, 551 F.2d 304 (4th Cir. 1977) and Proctor v. State Farm Mutual Automobile Insurance Co., 561 F.2d 262 (1977) (vacated and remanded, 99 S.Ct. 1417 (1979)). Royal Drug, 99 S.Ct. 1072, n.2.

I agree that there is an important distinction between the two cases--as the four dissenting members of the Court emphasized, Royal Drug

> is not a case where the petitioner pharmacies themselves conspired to exclude others from the market, and either pressured Blue Shield to go along, or were voluntarily joined by the insurer. Such an agreement among pharmacies, itself neither necessary nor related to the insurer's efforts to satisfy its obligation to its policyholders, would be outside the "business of insurance." An insurance company cannot immunize an illegal conspiracy by joining it. Id., 99 S.Ct. at 1904 (Brennan, J., dissenting) (citations omitted)

The majority's holding in this case gives insurers the power to immunize such conspiracies. Plaintiffs allege that the Virginia and American Chiropractic Associations established a peer review mechanism for the express purpose of fixing prices and monopolizing the profession, through the device of a fixed maximum charge per office visit. This fixed ceiling is significantly lower than the fee normally charged by plaintiffs, whose different treatment methodology, involving a greater number

of treatments per visit, is opposed by the Associations' members. Accepting these allegations as true, as we must on a motion to dismiss, the majority now holds that, by persuading insurance companies to utilize their peer review committees and their fee schedules, the defendant chiropractors have successfully immunized their conduct from antitrust liability.

The legislative history of the McCarran Act, as it applies to the antitrust laws, shows that the sole congressional concern was with the effect of uncontrolled competition on insurance companies, whose continued solvency and ability to meet future obligations to policyholders was essential.[2/] By extending McCarran Act immunity to the type of conduct alleged here, where both the perpetrators of the conduct and its impact are outside the insurance industry, the majority ignores the purpose of the Act and the Royal Drug Court's explicit direction on its construction:

> It is well settled that exemptions from the antitrust laws are to be narrowly construed. This doctrine is not limited to implicit exemptions from the antitrust laws, but applies with equal force to express statutory exemptions.
>
> Application of this principle is particularly appropriate in this case because the Pharmacy Agreements involve parties wholly outside the insurance industry. In analogous contexts, the Court has held that an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties. Id., 99 S.Ct. at 1083 (citations omitted).

I do not believe that the McCarran Act provides any shield for the conduct of defendant chiropractors. Further, the insurance companies themselves may have forfeited any exemption to which they might otherwise be entitled, by their participation in the alleged scheme.[3/] The plaintiffs' allegations raise complex issues, which cannot be decided without further development of the record.

II.

Even if the conduct of defendants is properly considered to be the "business of insurance," the McCarran Act does not automatically exempt it from the application of the federal

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[2/] Congress' primary concern in enacting the McCarran Act was to "ensure that the States would continue to have the ability to tax and regulate the business of insurance," Royal Drug, 99 S.Ct. at 1076, following the Supreme Court's ruling that insurance is interstate commerce. The applicability of the antitrust laws to the insurance business was only a "secondary concern," which "focused simply on whether cooperative rate-making should be exempt." Id. at 1076, 1079. See S. Rep. No. 20, 79th Cong., 1st Sess. (1945); H.R. Rep. No. 143, 79th Cong., 1st Sess. (1945); 91 Cong. Rec. 1442-1444, 1477-1489 (1945).

[3/] Plaintiffs claim that the insurance companies' participation goes beyond their use of peer review recommendations to determine the amount of reimbursement they will pay. According to plaintiffs, the insurers have advised their policyholders that plaintiffs' fees are unreasonable, and have defended policyholders against suit brought by plaintiffs to recover the difference between plaintiffs' actual charge and the ceiling fixed by the peer review committee.

antitrust laws. The statute affirmatively provides that these laws "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." McCarran-Ferguson Act §2(b), 15 U.S.C. §1012(b) (emphasis supplied).

The McCarran Act was a direct and immediate response by Congress to the Supreme Court's decision in United States v. South-Eastern Underwriters Association, 322 U.S. 533 (1944), which shattered the assumption that regulation of the insurance business was within the sole province of the states. Reversing a seventy-five year old precedent, the Court held that the industry was subject to federal regulation in general, and to the provisions of the Sherman Act in particular. The McCarran Act represents a compromise between the House of Representatives' desire to restore the status quo, by totally exempting the business of insurance from the federal antitrust laws, and the Senate's belief that the necessary public supervision of the industry could be best accomplished by full application of those laws.[4/]

[4/] For a detailed history of the McCarran Act, see C. Weller, The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy, 1978 Duke L.J. 587.

The statute establishes a scheme of complementary state and federal regulation of the insurance business, with the states given primary--but not exclusive--authority. The states may regulate the business of insurance within their boundaries, and may authorize practices which might reduce competition in the insurance industry. But the federal antitrust laws still apply to protect the public from practices which the states have not chosen to regulate.

The state of Virginia closely regulates many aspects of the insurance industry through its State Corporation Commission. See Va. Code §38.1-1 et seq.[5/] But neither the Virginia Code,

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[5/] Two of the ten articles in the Virginia Code's insurance provisions were enacted in direct response to the McCarran Act. Article 6 apparently seeks to fully displace the Federal Trade Commission Act within the state, by listing and defining all insurance company practices "which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." Va. Code §§38.1-49 to -57. See FTC v. National Casualty Co., 357 U.S. 560 (1958). The State Corporation Commission is given enforcement power, but may not "enlarge upon or extend" the detailed listing in the statute. Va. Code §38.1-53. Article 7, the "antitrust provisions," does not purport to be similarly exclusive. It simply forbids two types of activities, insurance company mergers and interlocking directorates, if they would "substantially lessen competition in the business of insurance, or [tend] to create a monopoly therein." Id., §§38.1-58, -59. There is no indication that, by failing to deal with other practices having an anticompetitive impact, the Virginia legislature intended to authorize such practices or to remove them from federal antitrust scrutiny.

In addition to the Code provisions relating specifically to the insurance business, Virginia has a state antitrust law, Va. Code §59.1-9.1 et seq., which arguably applies to the conduct alleged in plaintiffs' complaint. See Blue Cross v. Commonwealth, 211 Va. 180, 176 S.E.2d 439 (1970). But the McCarran Act does not grant primacy to all types of state regulation

nor any regulation promulgated by the Commission, provides public supervision of an insurer's methods for determining reimbursement rates.[6/] Therefore, I believe that this activity remains subject to the federal antitrust laws, regardless of how intimately it may be related to the "business of insurance."

In enacting the McCarran Act, "Congress was willing to permit the States to substitute regulation for competition" within the insurance industry. St. Paul Fire & Marine Insurance Co. v. Barry, 98 S.Ct. 2923, 2933 (1978). By failing to determine whether the state has, in fact, regulated the conduct at issue here, the majority allows what Congress was not willing to permit[7/]--action by "private groups. . .to enforce not public regulations written by public authority but regulations for the insurance business which they wrote themselves." 91 Cong. Rec. 1485 (1945) (remarks of Sen. O'Mahoney).

I respectfully dissent.

(Footnote 5 continued)

which might apply to the business of insurance. The Act concerns only "the type of state regulation that centers around the contract of insurance." SEC v. National Securities, Inc., 393 U.S. 453, 460 (1969).

[6/]In 1977, the insurance code's listing of unfair or deceptive trade practices was amended to prohibit fourteen specific "unfair claim settlement practices." Va. Code §38.1-52(8a). Regardless of whether this statute now provides state regulation of the particular conduct at issue in this case, and it is not clear from the face of the statute that it does, it would not bar plaintiffs' complaint, which was filed in 1977 and concerns conduct which began in 1973.

The conduct of defendant chiropractors is clearly not regulated by the state's insurance laws. Those laws apply only to insurance companies and their agents, and the State Corporation Commission, which has enforcement responsibility, has no authority over providers of services. See Blue Cross v. Commonwealth, supra, 176 S.E.2d at 447. Yet the majority offers McCarran immunity to all defendants, including the ACA, which is not even subject to service of process within the state.

[7/]In signing the McCarran Act, President Roosevelt stated that "Congress did not intend to permit private rate fixing

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(Footnote 7 continued)

which the Antitrust Act forbids, but was willing to permit actual regulation of rates by affirmative action by the states." S. Rosenman, The Public Papers of Franklin D. Roosevelt 587 (1950) (quoted in Royal Drug, supra, 99 S.Ct. at 1079). As the Court noted in Royal Drug, 99 S.Ct. at 1076-1080, the floor debates also show that the Act's purpose was to defer to the states' desire to permit certain anti-competitive conduct, particularly cooperative ratemaking. See 91 Cong. Rec. 1442-1444, 1477-1489 (1945).

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 78-1735

Carl D. Bartholomew, D.C., et al

Appellees,

versus

Virginia Chiropractors Association etc., et al

Appellants,

versus

American Chiropractic Association, et al,

Defendants.

No. 78-1736

Carl D. Bartholomew, D.C., etc., et al

Appellees.

versus

Virginia Chiropractors Association, Inc. etc., et al,

Defendants.

and

The Metropolitan Life Insurance Company, et al

Appellants.

ORDER

Upon consideration of the appellees' petition for rehearing and suggestion for rehearing en banc and no judge having requested a poll on the suggestion for rehearing en banc,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Bryan with the concurrence of Judge Hall and Judge Warriner.

For the Court.

FILED

JAN 9 1980

U. S. Court of Appeals
Fourth Circuit

/s/ [illegible]

CLERK

Appendix B

OPINION

FILED

MAY 19 1978

JOSEPH P. WATT, Clerk

BY: James C. Turk, Chief
U. S. District Judge

The plaintiffs in this anti-trust case ask damages and injunctive relief for violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C.§§ 1,2. Plaintiffs are five chiropractors engaged in the private practice of chiropractic in Virginia and West Virginia who challenge the peer review procedure utilized by health insurance carriers in conjunction with the Virginia Chiropractors Association. They allege that the defendants engage in a conspiracy and combination to fix prices and to boycott, coerce, and intimidate plaintiffs in an effort to monopolize the practice of chiropractic.

Defendants Metropolitan Life Insurance Company, the Aetna Casualty and Surety Company, and The Travelers Insurance Company provide health insurance coverage to individuals and groups that includes coverage for chiropractic services. The insurance contracts limit reimbursement to usual and customary charges for necessary health care services rendered. Defendant Virginia Chiropractors Association, Inc. (VCA), a professional organization, sponsors a Peer Review Committee that upon request examines claims submitted to the insurer to determine if the claim exceeds a reasonable, usual and customary charge for that service. The individual defendants, Doctors Wright, Dodge, Goodfield, Henderson and McClelland are past members of the VCA Peer Review Committee. Defendant William Vohringer is the president of the Association and in that capacity is responsible for appointing the members of the Peer Review Committee. The defendant American Chiropractic Association (ACA) is a non-profit

professional organization incorporated in Delaware. Its principal place of business is Des Moines, Iowa. The ACA maintains an Insurance Commission which has a peer review subcommittee and an Appeals Review Committee. The latter committee is organized to review appeals of decisions by state peer review groups.

As stated in the pleadings and amplified in memoranda and oral arguments, the plaintiffs allege that the VCA Peer Review Committee determines the usual and customary fee for services performed and therefore the insurer's liability under the policy, by using a fee schedule supplied by the ACA. The committee then informs the insurance company of its obligation on that claim. Plaintiffs further allege that the committee has set a fixed maximum compensation that the insurers should reimburse per office visit, and that maximum is not adequate to compensate for the more numerous and intensive treatments performed in each office visit by these plaintiffs. The insureds who are plaintiffs' patients are therefore not reimbursed for all treatments performed within that one office visit. The plaintiffs argue that this situation results in a partial boycott, i.e., the insurers in combination with the VCA and ACA refuse to deal with the service providers for those chiropractic services performed during one office visit that are billed above the maximum fixed fee per visit. They further claim that the result of this conspiracy is to coerce plaintiffs' patients not to continue to use plaintiffs' services because they will not be adequately reimbursed for those services, and to coerce chiropractors themselves to adhere to the VCA/ACA fee schedule. They have stated that the conspiracy is directed at these plaintiffs because their theory of chiropractic treatment differs from that of the members of the VCA.

Plaintiffs have also asserted ancillary state claims against the individual defendants and the VCA for interference with contractual

relations and for libel and slander for which they seek compensatory and punitive damages. All defendants have motions pending before the court. The insurance companies have moved for dismissal on the ground that the action against them is barred by the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15. Defendants Virginia Chiropractors Association and the individual defendants have answered the complaint and moved the court to enter judgment on the pleadings on the ground that the claims against them are also barred by the McCarran-Ferguson Act. These defendants have also moved to dismiss the state claims on the ground that the court will lack jurisdiction over those claims if judgment is entered in their favor on the federal antitrust claim. The American Chiropractic Association has moved to quash service of process and to dismiss for lack of personal jurisdiction and improper service. This defendant has also moved for summary judgment in its favor on the merits. For the reasons below, all defendants motions are denied at this time.

A. INSURANCE COMPANY DEFENDANTS

The insurance companies maintain that the McCarran-Ferguson Act which exempts the business of insurance from the federal antitrust laws and other statutes to the extent regulated by the states, in the absence of conduct amounting to boycott, coercion, or intimidation bars this action against them. The plaintiffs have conceded that these insurer-defendants come within the "business of insurance" and are regulated by the state, but claim that the McCarran-Ferguson Act does not shield their conduct from Sherman Act liability because the defendants have engaged in boycott, coercion and intimidation, 15 U.S.C. § 1013(b).

These defendants' first argument in support of their motion is that plaintiffs' allegations, if true, at most show that defendants may have engaged in a price fixing agreement but not conduct that falls within the traditional antitrust concept of a boycott. Second, they

urege that the terms "boycott, coercion, or intimidation" used in the McCarran-Ferguson Act have been given a very narrow interpretation and been limited to apply only to boycotts of other insurance companies or insurance agents, conduct not alleged by these plaintiffs.

The latter interpretation of the "boycott" language is most firmly rooted in the Ninth Circuit, Addrisi v. Equitable Life Assurance Society, 503 F.2d 725, 728-29 (9th Cir. 1974), cert. denied, 420 U.S. 929 (1975), but is not the rule in the Fourth Circuit, Ballard v. Blue Shield of Southern West Virginia, Inc., 543 F.2d 1075, (4th Cir. 1976), cert. denied, 430 U.S. 922 (1977). One reason for this interpretation has been that the McCarran-Ferguson Act was passed as a response to United States v. South-Eastern Underwriters Assoc., 322 U.S. 533 (1944), the case in which the Supreme Court applied the anti-trust laws to insurance companies. In that case defendant insurance companies had engaged in a conspiracy to fix premium rates and had enforced that price fixing agreement by boycotts "together with other types of coercion and intimidation,"[1] to force other insurance companies into the conspiracy. However, the defendants in South-Eastern Underwriters also applied coercion against potential customers for insurance as well as the other insurance companies,[2] so that the argument for the narrow interpretation in the cases cited by defendants is not persuasive, and see Proctor v. State Farm Mutual Auto Insurance Co., 561 F.2d 262, 272-74 (D.C. Cir. 1977), cert. docketed No. 77-580 (U.S. 10/19/77); Barry v. St. Paul Fire & Marine Insurance Co., 555 F.2d 3 (1st Cir. 1977), cert. granted 46 L.W. 3293. The issues of whether the boycott language applied only to other insurors, and if not whether a boycott under the act is more narrow than under traditional anti-trust law, have recently been argued before the Supreme Court by counsel for the insurance company defendants, Barry, supra.[3] Until such time as defendants are successful in that appeal, this court declines

to adopt the narrow interpretation of the "boycott" language.

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1. United States v. South-Eastern Underwriters Assoc., 322 U.S. 533, 535 (1944).

2. Id.

3. Reported at 46 L.W. 3609.

At oral argument, these defendants relied primarily on the fact that the conduct alleged does not constitute a traditional anti-trust boycott under any interpretation. However, these defendants had at first improperly chararterized plaintiffs' complaint as stating that "insurance company defendants will not pay insureds treated by plaintiffs more than they would pay for the same services when performed by other chiropractors in the same community."[4] However, the plaintiffs' theory is not that they are paid the same as other chiropractors but that they are unpaid for certain services they perform within one office visit.

Defendants define a traditional boycott in antitrust theory as conduct involving "the use of the coercive force of a collective refusal to deal,"[5] such as in Klors v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). However, in Klors, the condemned conduct not only consisted of a refusal by distributors and manufacturers in conspiracy with the defendant to supply the defendant's competitor on any terms, but also the agreement to sell at less favorable terms than offered to the defendant. That boycott included a refusal to deal except on unfavorable terms. These plaintiffs allege a boycott within that definition that is enforced for the purpose of forcing them to adopt a given course of conduct dictated by the conspirators.[6]

Defendants argue that plaintiffs must allege that the defendants engaged in separate and independent activity to enforce the

maximum price which they will pay on the health care claim, such as

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4. Insurance Company Defendants' Memorandum of Points and Authorities in Support of Their Motion to Dismiss the Complaint Against Them at 3. Italics in original.

5. Id. at 23.

6. 11 J. Von Kalinowsky, Antitrust Law and Trade Regulation, § 76.02 (1977 ed.); P. Areeda, Antitrust Analysis 381 (1974); Brief of Insurance Companies, St. Paul Fire & Marine Insurance Co. v. Barry, reported at 46 L.W. 3609.

refusing to allow their policyholders to use the plaintiff chiropractors. They state that a boycott necessarily involves some enforcement activity beyond merely price fixing or exerting economic pressure, Proctor, supra. At this point in the proceedings, however, plaintiffs are alleging that their patients were coerced as was alleged of pharmacy customers in Royal Drug Co. v. Group Life & Health Insurance Co., 556 F.2d 1375, 1379, cert. granted, No. 77-952 (U.S. 2/22/78), or of a farmers cooperative that sought a selling time allotment, American Federation of Tobacco Growers v. Neal, 183 F.2d 869, 872 (4th Cir. 1950), or upon manufacturers of gas burners whose customers could not purchase gas, Radiant Burners, Inc. v. Peoples Gas Light & Coke Co. 364 U.S. 656 (1961). That is, the perpetrator of the boycott need not have directly forbidden the trader-customer, or in this case, doctor-patient, relationship.

Although Proctor, supra, is persuasive precedent this court cannot now say that the plaintiffs beyond doubt could not prove any set of facts to support their claim. In addition, since the coming Barry decision may shed added light on the subject of the McCarran-Ferguson boycott exemption, this court will at this time deny the insurance companies' motion to dismiss.

B. VIRGINIA CHIROPRACTORS ASSOCIATION AND INDIVIDUAL DEFENDANTS

The Virginia Chiropractors Association and the individual defendants have moved for judgment on the pleadings on the ground that the peer review committee's activities also fall within the business of insurance, and do not constitute a boycott. Therefore, these defendants urge that they come within the McCarran-Ferguson Act exemption. They also have moved the court to dismiss the ancillary claims for lack of jurisdiction.

This motion must also be denied for the reasons above. In addition, the plaintiffs dispute that these defendants engage in the business of insurance. Defendants urge that the exclusion is available to non-insurance companies when their activities are closely related to determining the proper amount of insurer liability on insurance claims, e.g. when the non-insurer acts as an insurance adjustor. However, the plaintiffs allege that the VCA's stated purposes, to encourage quality chiropractic services at fair prices, and, less charitably, to enforce the professional views of the VCA regarding proper methods of patient care, are not related to the business of insurance. These allegations, if true, could place the VCA's peer group activities beyond the scope of the business of insurance, see Proctor, supra, at 268, fn. 10. The VCA's and individual defendants' motions are therefore denied.

C. AMERICAN CHIROPRACTIC ASSOCIATION

The American Chiropractic Association has moved to quash service of process and dismiss the complaint as to it on the grounds that it had not been properly served and that it is not subject to the jurisdiction of this court. The defendant relies on 15 U.S.C. § 22, the statute that prescribes proper venue for corporations who are antitrust defendants. This statute makes venue proper in any district of which

the corporation is an inhabitant, or in which it may be found, or in which it transacts business. The first two alternatives are not met in this case and defendant states that it does not transact business in this judicial district. A corporation will be transacting business in a district within the meaning of this section if, in "the ordinary and usual sense" it transacts business of any substantial character.[7] The test of venue has been described as the "practical, everyday business or commercial concept of doing or carrying on business."[8]

This defendant has stated that it is not qualified to do business in Virginia, has no office in this district, no officers or other agents here, owns no property here, has conducted no seminars or workshops here, and makes no purchases from nor sells its products to this district, except for pamphlets, journals, and educational and public relations materials of small value.

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7. Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 373 (1927).

8. United States v. Scophony Corp., 333 U.S. 795, 807 (1948).

The ACA, however, is not a commercial, profit-making organization whose business can be described by sales and purchases, but is a non-profit organization whose activities are described as educational and informative in nature directed toward advancement of the chiropractic profession, the improvement of chiropractic performance and toward better understanding of the profession by the public, insurers, and government.[9] Public relations and professional advancement are its "business". The plaintiffs have alleged that in furtherance of this "business" the ACA has solicited every commercial and educational radio and television station in Virginia for air time, and received air time, billboard space and newspaper space valued at more than $250,000 for the years

1974-76. The ACA provided the radio and television recordings and films, which in 1976 cost $180,000 to prepare. These amounts are substantial and show a continuous solicitation of advertising time in this district in furtherance of defendant's essential purpose, to supply information about the chiropractic profession, Levin v. Joint Commission on Accreditation of Hospitals, 354 F.2d 515 (D.C. Cir. 1965); Marjorie Webster Jr. College v. Middle States Assoc. of Colleges and Secondary Schools, Inc., 302 F. Supp. 459 (D.D.C. 1969), rev'd. on other grounds, 432 F.2d 650, (D.C. Cir.) cert. denied, 400 U.S. 965 (1970).

The ACA has minimized its role in and its authority over state peer review programs and has stated that development and implementation of peer review has always been the responsibility of the state organization, so that the ACA has not come into this district to participate with the VCA peer review program. However, the ACA has maintained an active training program for state peer review personnel and has trained the Virginia personnel, has actively corresponded with the VCA and its peer review committee (as part of its correspondence with all state associations and has sent to Virginia guidelines to standardize state peer review, and

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9. Affidavit of Louis O. Gearhart, Executive Director of the American Chiropractic Association, dated June 14, 1977.

a relative value fee schedule allegedly used in Virginia, has established an appeals board for review of peer review decisions and allegedly reviewed a Virginia claim, and has phrased much of the correspondence that has gone to the Virginia Association in the imperative.[10]

The ACA also trains and approves chiropractors as insurance consultants. To be eligible, an individual chiropractor must also have served on a peer review committee. Six individuals have been approved in Virginia.

The ACA therefore has advanced both its purposes substantially and with continuity through a combination of public informational and educational activities in this district so that venue here is appropriate,[1] Hogus v. American Speech and Hearing Assoc., 389 F. Supp. 327 (E.D. Pa. 1975). Service of process upon the ACA's agent in Delaware, its state of incorporation, was also proper pursuant to 15 U.S.C. § 22.

The ACA has also moved this court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Defendant's first memorandum in support of this motion stated that the sole issue of law presented by the motion is "whether defendant American Chiropractic Association ("ACA") combined and conspired with the other defendants herein to fix and maintain the fees of chiropractic practitioners, and thereby unreasonably restrained the trade and commerce of the plaintiffs and other chiropractors in the furnishing of chiropractic services, in violation of Section 1 of the Sherman Act."[12]

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10. The ACA has stated that the correspondence and fee schedule sent to the VCA were sent by Montfort C. Mitchell, D.C., Chairman of the ACA Insurance Commission, but that he is not an officer, employee, or agent of the ACA. A review of this correspondence, however, shows that it clearly bore the imprimatur of the ACA and that the recipient could reasonably believe that Dr. Mitchell acted on behalf of the ACA and in an official capacity.

11. The parties have not always distinguished the State of Virginia and the area that is the Western District of Virginia. However, if the plaintiffs were to prove venue in the Eastern District, in which defendant has had additional contacts, we assume that case would be consolidated with this action against the VCA and the insurers in this district.

12. Memorandum of Points and Authorities In Support of Defendant ACA's Motion for Summary Judgment, at 1.

Defendant has presented thirty-five "material facts as to which there is no genuine issue."[13] A number of these facts relate to ACA's description of its role in relation to state peer review

committees as being purely advisory.[14] Another group describes the thirty-six Peer Review Leadership Training Programs conducted by the ACA in which trainees are advised, inter alia, that their function is not to establish the chiropractor's usual and customary charge for insurance contract purposes, but to ascertain what that charge is.[15] The bulk of the remaining "facts" describes the history of the hostility of the medical profession and health insurance industry to chiropractic, and the struggle that the chiropractic profession has maintained to both persuade health insurers to include chiropractic services in health insurance coverage and to allow peer review committees composed of chiropractors to assist in determining the amount of insurance coverage. Defendant's last material fact is that its peer review appeal committee has never reviewed any claims from the VCA.[16]

The ACA contends that the plaintiffs have not established that any of the defendants have conspired to fix prices, or in the alternative, that the ACA conspired with any of the other defendants, assuming that those defendants did engage in price fixing. It bases this argument primarily on its assertions that its role in peer review is purely advisory, that its advice to trainees is that they are to act only as mediators between insurers and insureds, and that it also teaches that peer review should not in any way interfere with the relationship or fee payment between doctor and patient. However, as stated above, the court finds that certain ACA Peer Review Guidelines and correspondence

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13. The "material facts" were incorrectly numbered so that the Memorandum presents them as thirty-four facts.

14. Material Facts #3-13.

15. Material Facts #14-18.

16. Material Fact #34.

from its insurance committee are phrased in a style more imperative than advisory,[17] and the inferences from those memoranda, guidelines, and the ACA's relative value schedule are still in issue. The parties also dispute the role played by the ACA in reviewing a VCA peer review decision in 1977, and the extent to which the procedure interferes with the fee paid to a treating chiropractor by his patient. At this point in the proceedings then defendant is not entitled to judgment as a matter of law on the issue of the existence of price fixing, or whether the ACA combined or conspired to maintain such a price fix.

Defendant has also argued in its second memorandum and at oral argument on this motion that were the peer review procedure considered a restraint of trade other than a price fixing agreement then under the rul of reason the procedure does not violate the anti-trust laws. For this purpose, ACA has again outlined the history of peer review, reasons for its adoption, and its purposes. As stated above, the ACA describes its continuing attempts to maintain both insurance coverage for chiropractic services, and peer review by chiropractors rather than medical doctors, and also to retain the viability of the chiropractic profession in the health care market. It argues that this history and the purposes of peer review justify any restraint under the rule of reason. This issue is also not suitable for summary judgment at this time. Plaintiffs dispute the applicability of the rule of reason, and the purposes of the peer review procedure, inferring that it is also used as a method of coercion against chiropractors who practice intensive care therapy, a theory of practice that has not been endorsed by the ACA.

In sum, the defendants have not shown that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. The motion for summary judgment is therefore denied.

ENTER: This 15 day of May, 1978.

Chief U. S. District Judge

17. See, e.g., Letter of Montfort C. Mitchell, D.C. to State Association presidents, dated January 3, 1973, Exh. A to Defendant ACA's Answers to Plaintiff's Interrogatories; Peer Review Guidelines quoted in Material Facts #5-8 Defendants Memorandum, supra.

A TRUE COPY, TESTE:

Joyce F. Witt, Clerk

By: Barbara T. Martin
Deputy Clerk

APPENDIX C

McCARRAN-FERGUSON ACT

§ 1---Declaration of policy

The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

§ 2---Regulation or taxation by states; effect of federal statutes; application of anti-trust laws

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

§ 3---Limited suspension of application of antitrust laws

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.